

DOCKET NO.: NHH-CV18-6008208-S : **SUPERIOR COURT**
: **HOUSING SESSION**

TAOM HERITAGE NEW HAVEN LLC : **JUDICIAL DISTRICT OF NEW HAVEN**

VS. : **AT NEW HAVEN**

FUUN HOUSE PRODUCTIONS, LLC, ET
AL. : **DECEMBER 11, 2018**

PRETRIAL MEMORANDUM OF PLAINTIFF

In anticipation of the trial scheduled in the above-captioned matter on December 13, 2018, the Plaintiff, TAOM Heritage New Haven LLC (the “Plaintiff”) submits the following pretrial memorandum.

Introduction

1. This is an eviction action in which the Plaintiff seeks a judgment of possession against the Defendants, Fuun House Productions, LLC (“Fuun House”) and Peter Forchetti (“Forchetti”; together with Fuun House, collectively, the “Defendants”).

Background

2. Plaintiff is the owner of 85 Saint John Street, New Haven, Connecticut, formerly owned by the New Haven Clock Company (the “Property”). Plaintiff acquired the Property on or about June 27, 2018 from T.S.J., Inc. d/b/a TSJ Incorporated (“TSJ”). Plaintiff is in the process of performing certain pre-construction activities at the Property, including remediating certain environmental

conditions. Next year, it will begin to construct affordable housing at the Property for low-and moderate-income individuals and families.

3. The Defendants are in possession of a portion of the Property (the “Premises”), where they operate an adult entertainment establishment, which does business under the name “Scores” (sometimes referred to herein as the “Club”).

4. In 2002, Fuun House and its two former owners, Richard A. Simonelli, Jr. (“Simonelli”) and John E. Kraft (“Kraft”)¹ entered into a lease with Plaintiff’s predecessor-in-interest, TSJ (the “Lease”). The Lease, by its terms, commenced on April 1, 2002, and expired on March 31, 2017² (the “Lease Expiration Date”). Following the Lease Expiration Date, the Defendants remained in possession of the Premises.

5. In case of holdover, the Lease provides as follows:

After the expiration of the term of this Lease or any renewals hereof, if the Tenant does not vacate the demised premises, then such holding over by the Tenant shall not constitute a renewal or extension of this Lease. In such event, the Landlord, at the Landlord’s option, may treat the Tenant as a tenant occupying the demised premises on a month-to-month basis, subject to all the terms, covenants and conditions of this Lease, except as to the term thereof and the rent to be paid.

¹ Through a series of membership interest sales, in or around early 2016, Forchetti appears to have come to own the interests in Fuun House formerly owned by Simonelli and Kraft. Upon the sale of their respective interests in Fuun House, Simonelli and Kraft ceased to have an interest in the Premises; this action, accordingly, has been withdrawn as to each of them.

² The initial term of the Lease was five years (Lease, Art. I, § 1), and it had two five-year options (*id.* Art. II, § 1), both of which were exercised.

Lease, Art. 27, § 1.

6. TSJ consented to the Defendants' holdover thereby giving rise to a month-to-month tenancy. As the Lease Expiration Date was the 31st of March, the term of the month-to-month tenancy (the "Month-to-Month Lease") commenced and terminated on, respectively, the first and last days of each month thereafter.

7. Prior to and after the Lease Expiration Date, the Defendants paid rent to TSJ sporadically. Following Plaintiff's acquisition of the Property, Defendants have paid no rent (although they have deposited with the Court \$8,500 in use and occupancy for November and December 2018). Hundreds of thousands of dollars in back rent is owed.

8. Following Plaintiff's acquisition of the Property, on July 31, 2018, Plaintiff served a notice to quit the Premises on the Defendants (the "Notice to Quit"). The Notice to Quit specified a quit date of August 6, 2018, and alleged three bases: termination of lease due to lapse of time; originally had the right or privilege to occupy the Premises but such right or privilege has terminated; and never had a right or privilege to occupy the Premises.

Plaintiff's Complaint

9. Thereafter, following Defendants' failure to vacate the Premises by the quit date, Plaintiff commenced by service of process the instant summary process action. The complaint was in three alternative counts. The first count (lapse of time) alleges the Month-to-Month Lease has expired by

lapse of time. The second count (once had the right or privilege) does not allege that a month-to-month tenancy arose; rather, it alleges that following the Lease Expiration Date, the Defendants remained in possession of the Property without any right or privilege. And, the third count (never had the right or privilege), which is as to Forchetti only, alleges Forchetti was not a party to the Lease, the Month-to-Month Lease, or any other agreement conferring an interest in the Premises, and thus, Forchetti never had any right or interest in the Premises.

10. Plaintiff's original complaint has since been revised in response to Defendants' request to revise (Doc. # 113). The revisions are largely non-substantive. The counts of Plaintiff's revised complaint (Doc. # 117) are substantively the same as in the original complaint.

Defendants' Answer and Special Defenses

11. Following multiple dilatory pleadings (Doc. ## 106, 113, 127), Defendants filed an answer and special defenses on November 26, 2018. *See* Doc. # 132. They have pled three special defenses. "The purpose of a special defense is to plead facts which are consistent with the allegations of the complaint but show, notwithstanding, that the plaintiff has no cause of action." *McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc.*, 93 Conn. App. 486 (2006). As discussed below, none of Defendants' defenses does this.

*Defendants' First Special Defense –
Oral Extension of Lease*

12. Defendants' first special defense alleges that, following the expiration of the Lease, which as noted, occurred on March 31, 2017, TSJ orally extended the term of the Lease for an unspecified period of time that (conveniently) has yet to expire. First Special Defense, ¶¶ 1, 4. In reliance on such extension, Defendants claim Fuun House invested "substantial funds" in the Premises. *Id.* ¶ 2.

13. It is anticipated that the principals of TSJ (each of whom will be under subpoena) will testify that no such agreement was ever made. In that case, assuming the Court credits their testimony, the special defense has no effect on any of the bases for the eviction.

14. But even if the principals of TSJ do not testify as anticipated, or the Court does not credit their testimony, the special defense does not vitiate the "once had the right or privilege" and "never had the right or privilege" counts. This is because the alleged agreement to extend the lease is not binding on Plaintiff as (a) it would violate Section 8 of Article XXX of the Lease, which requires modifications to the Lease be in writing³, and more fundamentally, (b) it would amount to an unrecorded lease of more

³ That section provides:

WRITTEN MODIFICATIONS: No modification, release, discharge, or waiver of any provisions of this Lease shall be of any force, effect, or value unless in writing signed by the Landlord, or its duly authorized agent or attorney.

Lease, Art. XXX, § 8.

than a year, which, by statute, is not “effectual against any persons other than the lessor and lessee and their respective heirs, successors⁴, administrators and executors . . .” Conn. Gen. Stat. § 47-19.⁵

*Defendants’ Second Special Defense –
Oral Extension of Lease*

15. Defendants’ second special defense is identical to the first. Only the alleged reliance is different. In this regard, rather than alleging that, in reliance on TSJ’s alleged promise to extend the term of the Lease, Fuun House invested substantial funds in the Premises, Defendants instead allege that Fuun House passed “on the opportunity to timely and orderly relocate its business.” Second Special Defense, ¶ 2.

⁴ Term “successor” refers only to those who take property by will or inheritance, rather than to successors in interest in general. *Drazen Properties Ltd. P’ship v. E.F. Mahon, Inc.*, 19 Conn. App. 471, 475 (1989).

⁵ Conn. Gen. Stat. § 47-19 provides:

No lease of any building, land or tenement, for life or for any term exceeding one year or which provides for the renewal thereof or an option to purchase such building, land or tenement, *shall be effectual against any persons other than the lessor and lessee and their respective heirs, successors, administrators and executors, unless it is in writing, executed, attested, acknowledged and recorded in the same manner as a deed of land*, provided a notice of lease in writing, executed, attested, acknowledged and recorded in the same manner as a deed of land and containing (1) the names and addresses, if any are set forth in the lease, of the parties to the lease, (2) a reference to the lease, with its date of execution, (3) the term of the lease with the date of commencement and the date of termination of such term, (4) a description of the property contained in the lease, (5) a notation if a right of extension or renewal is exercisable, (6) if there is an option to purchase, a notation of the date by which such option must be exercised and (7) a reference to a place where the lease is to be on file shall be sufficient.

C.G.S. § 47-19 (emphasis added).

16. As the defense is the same as the first, it fails for the same reasons. It is either (a) untrue and does not vitiate any count, or (b) true and does not vitiate the “once had the right or privilege” and “never had the right or privilege” counts (as, again, the claimed agreement was not in writing, and, in any case, constitutes an unrecorded lease of more than a year).

*Third Special Defense –
Plaintiff’s Denial of Access to Courtyard Parking*

17. Defendants’ third special defense alleges that the Plaintiff has unfairly “engaged in self-help tactics” by denying Defendants access to the courtyard parking lot at the Property. Third Special Defense, ¶ 3. Defendants are referring to the fact that Plaintiff has staged certain of its construction activities in the courtyard, and has also undertaken extensive environmental abatement and remediation activities in that area of the Property. As a result, Plaintiff has needed to close off public access to the courtyard.

18. What Defendants elide is that before Plaintiff did anything with respect to the courtyard, Alex Dzyuba, a principal of the company that owns Plaintiff, contacted Fuun House regarding the need to limit the club’s access to the courtyard as construction proceeded. Mr. Dzyuba discussed the issue with the club’s general manager, and then, Forchetti himself. Both agreed that the Plaintiff could restrict access to the courtyard, as it only minimally affected the club, which had ample on-street parking available. In reliance, the Plaintiff closed off the courtyard, and commenced construction. Email correspondence confirms and corroborates the foregoing.

19. Putting aside the factual issues described in ¶ 18 above, Defendants' third special defense fails for multiple additional reasons.

20. First, Defendants' claimed right to "access" to the courtyard is predicated on Article XXIX of the Lease, which confers a license on Tenant to "park a minimum of thirty (30) cars in the courtyard." Defendants claim this provision remains in force, and must be honored by the Plaintiff because of Article XXVII of the Lease, which, as noted, provides, in the event of holdover by the Tenant, that the Landlord "may treat the Tenant as a tenant occupying the demised premises on a month-to-month basis, *subject to all the terms, covenants and conditions of this Lease*, except as to the term thereof and the rent to be paid." Lease, Art. XXVII, § 1 (emphasis added). But Defendants do not claim that a month-to-month tenancy arose upon expiration of the term of the Lease; they claim the Lease was orally extended for well in excess of a year. *See generally* First and Second Special Defenses. Taking them at their word, the provisions of the Lease (including the license to use the courtyard parking lot) are not "effectual" against the Plaintiff under Conn. Gen. Stat. § 47-19, and thus, need not be honored by it.

21. Moreover, and in any event, denying Defendants' access to the courtyard parking lot is not a special defense to Plaintiff's claims. The parking lot is not a part of the Defendants' Premises (from which Defendants have been "locked out"). It is a separate part of the Property, which, under the Lease, Defendants had a mere license to use. *See Tariffville Center Corporation v. Taylor, et al.*, 1992

WL 331883, at *2 (Conn. Super. Ct. Sept. 29, 1992) (Holzberg, J.) (finding license, not lease, where agreement “did not specify that defendants’ customers were to park in designated, defined spaces or were limited to a certain part of the lots”). Termination of that license does not vitiate Plaintiff’s claims; at most, it gives rise to a claim for monetary damages in an action for breach of lease.

THE PLAINTIFF,
TAOM HERITAGE NEW HAVEN LLC

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, postage prepaid, or emailed to all counsel and pro se parties of record on this 11th day of December, 2018, as follows:

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